88-2137

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term. 1988

MICHAEL MCMONAGLE, et al.
Petitioners

v.

NORTHEAST WOMEN'S CENTER, INC.
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

This case arises out of a suit by a plaintiff abortion clinic against 42 individual protesters under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.§1964(c) ("RICO"). It followed over nine years of protest activities in the area of plaintiff's place of business during which petitioners and hundreds of others participated regularly in protests against abortion by engaging in demonstrations, picketing in public *fora,* chanting, leafletting and other First Amendment protected activities. Civil RICO liability was imposed on the theory that petitioners' participation in one or more of four sit-ins held at the plaintiff clinic constituted extortion under the Hobbs Act, 18 U.S.C. §1951 ("Hobbs Act"). Based upon the finding of a RICO injury in the amount of $887, petitioners were held liable for the payment of treble damages, $65,000 in attorneys fees, and over $42,000 in damages attributable to plaintiff's increased cost of doing business as a result of petitioners' protests.

This case presents the following questions:

1. Does the First Amendment bar recovery from political protesters of damages for violation of RICO and state trespass law where the damages imposed do not flow directly and proximately from four sit-ins which comprised the only unlawful activity during the course of the protest?

2. May civil liability be imposed under RICO, 18 U.S.C. §1964(c), where neither the alleged RICO "enterprise" nor the "pattern of racketeering activity" had any profit-making element?

3. Does a plaintiff corporation have standing to recover under RICO, 18 U.S.C. 1964(c), where the "pattern of racketeering activity" alleged is based solely on two predicate acts: (1) attempted Hobbs Act extortion of the plaintiff's intangible right to conduct its abortion business free of interference; and (2) Hobbs Act extortion of the plaintiff's employees' property interest in continuing their employment relationship with plaintiff, and where the jury found

that neither the plaintiff, nor its employees had been injured by the conduct alleged to have constituted extortion of employees?

4. Is participation in one or more of a series of four sit-ins during the course of a political protest where the protesters neither conspired to obtain, attempted to obtain nor obtained any tangible or intangible property an indictable offense under the Hobbs Act, 18 U.S.C. 1951(a), and a predicate offense under RICO, 18 U.S.C. 1961(1)(b)?

5. Does Federal Rule of Civil Procedure No. 51 prohibit a finding of waiver of objections to jury instructions by an appellate court where the district court failed to rule on a party's proposed point for charge, failed to instruct as requested by the party deemed to have waived its objections, and no claim of waiver was raised in the district court?

PARTIES TO THE PROCEEDINGS

In addition to the parties shown in the caption, the parties include the following: Petitioners Dennis Sadler, Mary Byrne, Deborah Baker, Margaret Caponi, Thomas Herlihy, Anne Knorr, Robert Moran [appellants in No. 88-1333]; Petitioners John J. O'Brien, Joseph Wall, Roland Markun, Howard Walton, Patricia Walton, Henry Tenaglio, Stephanie Morello, Annemarie Breen, Ellen Jones, Kathy Long, Susan Silcox, Paul Armes and Walter Gies [appellants in No. 88-1334]; Petitioners Patricia McNamara and Thomas McIlhenny [appellants in No. 88-1335]; Donna Andracavage, Juan Guerra, and Helena Gaydos [appellants in No. 88-1336].

TABLE OF CONTENTS

TABLE OF CONTENTS – *(Continued)*

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – *(Continued)*

No.___

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Petitioners Michael McMonagle, *et al.,* respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1-32) is reported at 868 F.2d 1342. The order of the Third Circuit denying rehearing *in banc* (Pet. App. 33-34) is not reported. The decision of the U.S. District Court for the Eastern District of Pennsylvania dated March 31, 1988 (Pet. App. 35-69) is reported at 689 F. Supp 465; the decision dated June 8, 1987 is reported at 665 F. Supp. 1147; the decision dated May 8, 1987 (Pet. App. 74-109) is reported at 670 F. Supp. 1300; the decision dated February 12, 1987 (Pet. App. 110-138) is not reported; the decision dated October, 25, 1985 is reported at 624 F. Supp. 736.

JURISDICTION

The decision of the U.S. Court of Appeals for the Third Circuit was entered March 2, 1989. The U.S. Court of Appeals for the Third Circuit denied Rehearing *In Banc* on March 30, 1989. The time for filing a petition for writ of certiorari is therefore June 28, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The relevant portions of the Hobbs Act, 18 U.S.C. §1951, are set forth at Pet. App. 139. The relevant portions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et. seq.*, are set forth at Pet. App. 139-141. The relevant portions of the Federal Rules of Civil Procedure No. 51 is set forth at Pet. App. 142.

STATEMENT OF THE CASE

The Northeast Women's Center, Inc., a Pennsylvania for-profit corporation engaged in the business of performing first and second trimester abortions, commenced suit in 1985 against 42[1] individual defendants under, *inter alia,* the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1962(c) and (d), seeking treble damages, attorneys fees and costs, and injunctive relief. (Pet. App. 111-112). The

1. The District Court granted motions for directed verdict on all counts as to four defendants who had engaged in protest actions at the plaintiff clinic, but who had not engaged in any sit-in, on the ground that all other protest activities at the plaintiff clinic and in connection with residential picketing were protected First Amendment activities. After disposition of all other pre-trial and post-trial motions, 26 defendants remain, all of whom are petitioners herein.

plaintiff's suit was instituted following over nine years of protest activities in the area of the plaintiff's abortion clinic during which petitioners and hundreds of others participated in protests against abortion on demand by regularly[2] engaging in sidewalk counseling, demonstrations and picketing in public *fora,* chanting, and distributing literature. Petitioners also participated in at least one of four sit-ins at premises leased by respondent.[3]

The piaintiff's complaint, as amended, was based on two federal claims alleging that defendants' activities had violated the Sherman Antitrust Act, 15 U.S.C. §1, and the Racketeer

2. Protests were generally held on Wednesday, Friday and Saturday of each week from 1976 through the date suit was instituted in 1985. There were anywhere from a handful to several hundred protesters participating in the demonstrations, except that which occurred just prior to plaintiff opening its new location on Comly Road. Vehement and extensive opposition to the plaintiff abortion clinic opening a new office in Northeast Philadelphia drew approximately 4,000 people to a demonstration at the plaintiff clinic in May, 1986. While the demonstrations were generally peaceful, tensions were still running high at the demonstration held on June 21, 1986. Several hundred pro-abortion demonstrators surrounded the abortion clinic, linking arms while scores of pro-abortion advocates surrounded patients to prevent prolife demonstrators from approaching the patients. There was pushing and shoving as would be expected in such a situation and a small number of demonstrators attempted to stop women from entering the clinic. This demonstration was depicted in the videotape shown to the jury over petitioners' objections. The district court only later ruled that the jury could not consider in its deliberations any evidence other than the four sit-ins in which petitioners had participated on one or more occasions in determining if there had been a Hobbs Act extortion. (Pet. App. 94)

3. The sit-ins occurred on December 8, 1984, August 10, 1985, October 19, 1985 and May 23, 1986 at respondent's 9600 Roosevelt Blvd. location where it provided abortions commencing in 1977. Plaintiff currently leases offices at Comly Road, Philadelphia where it has been providing abortions since June, 1986. Respondent alleged that on each occasion, prolife protesters entered the building in which plaintiff leased office space and refused to leave until arrested by police. It was also alleged that certain of petitioners attempted to persuade women in the waiting area not to have abortions during the sit-ins. Plaintiff claimed a total of $887 in property damages to suction aspirator devices which it alleged were dismantled by some unidentified party during the sit-in on August 10,1985. This incident was the only one in which the plaintiff alleged any resultant property damage.

Influenced and Corrupt Organizations Act, 18 U.S.C. §1964(c), (hereinafter "RICO") and seven pendent state claims: trespass, intentional interference with contractual relations, intentional infliction of emotional distress, assault, battery, libel and slander. (Pet. App. 143-160). The only pendent state claims ultimately considered by the jury were trespass and intentional interference with contractual relations.[4] At the close of plaintiff's case, the district court directed the verdict on plaintiff's anti-trust cause of action for failure to state a prima facie claim on the grounds, *inter alia,* that plaintiff had deleted from its prayer for relief any claim based on lost revenues, had introduced no statistics indicating a fall in either gross income or net profits, and put on no witnessses to testify as to lost good will or customer confidence, and had testified that no woman was prevented from obtaining an abortion from plaintiff as a result of petitioners' activities. (Pet. App. 82). Thus there was no evidence of any injury to the business conducted by the plaintiff corporation.

Plaintiff's allegation of a RICO "enterprise" was that "defendants have, in association with each other and with others, formed an enterprise or series of associated enterprises, including the 'Pro-Life Non-Violent Action Project of Southeastern Pennsylvania,' 'The Pro-Life Coalition of Southeast Pennsylvania,' and 'Save Our Unborn Lives' " through which they were alleged to have "agreed among themselves and with others to organize, plan and take actions designed to disrupt, harrass and otherwise harm plaintiff's business and property, unless plaintiff ceases to provide abortion services to women." (Pet. App. 143-160). Upon disposal of all pre-trial motions, the plaintiff's RICO claims were characterized by the district court

4. Plaintiff withdrew its claims for libel and slander after petitioners indicated that they would take an immediate interlocutory appeal of the district court's ruling that truth is not a defense to libel and slander if the facts which defendants seek to prove in establishing truth are inconsistent with the United States Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113 (1973). Defendants were granted summary judgment on plaintiff's pendent state claims of assault, battery and intentional infliction of mental distress.

as alleging four RICO "predicate acts": (1) "robbery" of medical equipment during a sit-in on August 10, 1985; (2) conspiracy to extort the plaintiff's intangible right to continue its abortion business free of wrongfully imposed outside pressure; (3) conspiracy to extort from the plaintiff's patients their property interest in entering into a contractual arrangement with the plaintiff; and (4) conspiracy to extort from the plaintiff's employees their property interest in continuing employment at the plaintiff abortion clinic. (Pet. App. 87-88).

Over petitioners' repeated objections that the plaintiff had no standing to obtain relief under 18 U.S.C. §1964(c) for alleged extortions of its patients and its employees, (Pet. App. 88-90), the district court ruled that even though property interests of employees and patients cannot be said to have been "extorted" from the plaintiff, the jury could consider extortion of the plaintiff's employees and patients as the predicate acts necessary to establish a pattern of racketeering activity. (Pet. App. 90). The district court acknowledged that the issue raised a question of first impression, (Pet. App. 88), and cited no relevant precedent for its decision that a pattern of racketeering activity had been established and that plaintiff had standing. The Third Circuit affirmed, without citation of any precedent. (Pet. App. 16).

The plaintiff's evidence in support of its claim that petitioners committed Hobbs Act extortions consisted of videotapes of demonstrations outside the abortion facility and the May 23, 1986 sit-in, testimony concerning the four sit-ins and testimony concerning residential picketing at the home of some of plaintiff's employees. The videotape, which was introduced into evidence and viewed by the jury over the petitioners' objections, had been distilled from over 200 hours of video showing protests at the plaintiff clinic. It depicted persons other than defendants engaging in acts of the type which plaintiff alleged had instilled in its employees and its patients the fearful state of mind necessary to prove extortion.

The court submitted plaintiff's RICO claim to the jury only with respect to those defendants who had on at least one

occasion participated in a sit-in,[5] on the basis that all of the other activities in which petitioners had engaged were protected by the First Amendment and could not form the basis for civil RICO liability. (Pet. App. 90). Four defendants who had engaged extensively in protest activities at the plaintiff clinic, but were found not to have participated in any of the four sit-ins were dismissed from the case as to all claims, including RICO, regardless of whether they had participated in other of the activities which plaintiff claimed had comprised Hobbs Act extortion. Thus, the gravaman of plaintiff's RICO claim was simply an action for trespass.

Over the petitioners' objections that the evidence presented by plaintiff did not show that petitioners or any related third party had attempted to obtain or obtained any tangible or intangible property as required by the Hobbs Act, the district court refused a directed verdict on plaintiff's Hobbs Act extortion claim, (Pet. App. 97, and instructed the jury that it could base RICO liability on conspiracy to conspire or conspiracy to attempt a Hobbs Act extortion of the plaintiff's intangible right to engage in the abortion business (and of the patients' and employees' intangible rights) by participating in sit-ins at the plaintiff clinic.

The jury found that there had been no robbery and that *petitioners had not extorted from the plaintiff's patients their right to obtain abortion or other services at the plaintiff clinic.* The jury also found that three of the remaining defendants had intentionally interfered with plaintiff's employee contracts, but awarded no damages, since it found that the plaintiff had sustained no proximate loss as a result.[6]

5. No evidence was introduced that either Patricia Walton or Linda Corbett had participated in a sit-in, however the RICO claim (but not the trespass claim) against them was allowed to go to the jury based on evidence that they had both barricaded an entrance to the plaintiff clinic, and that Ms. Corbett had stood in plaintiff's driveway in the path of a physician's car.

6. Despite the importance of these findings to an analysis of both the constitutional questions raised by defendants and issues raised with respect to application of RICO and the Hobbs Act, neither of these findings was mentioned in the Third Circuit's summary of the jury's findings or elsewhere in its opinion upholding civil RICO liability. (Pet. App. 11-17).

The jury found that the remaining defendants had, by engaging in sit-ins or blocking entrances, violated RICO by committing two predicate acts consisting of (1) Hobbs Act extortion of the plaintiff corporation; and (2) Hobbs Act extortion of the plaintiff's employees.[7] The jury awarded civil RICO damages in the amount of $887 attributable to damage which the plaintiff alleged was done to its medical equipment by some unidentified person(s) during the sit-in which occurred on August 10, 1985. There was subsequently an award of over $65,000 in attorneys fees entered against defendants in connection with the finding of $887 in RICO liability. The jury also awarded $42,087.95 in trespass damages based upon plaintiff's purchase of a security system and the hiring of guards, 72% of which were expenditures made at a location different from that at which the four sit-ins occurred and a portion of the remainder of which was expended at a time prior to the first of the four sit-ins.

The Third Circuit panel affirmed the trial court's holding that evidence of petitioners' participation in one or more sit-ins was sufficient to permit a finding of Hobbs Act extortion of the plaintiff and its employees, and affirmed imposition of civil RICO liability based upon the jury's finding that plaintiff's suction aspirator devices had been dismantled by some unidentified party during the August 10, 1985 sit-in. (Pet. App. 11-17).

REASONS FOR GRANTING THE WRIT

The courts below have engaged in an unprecedented and dangerous expansion of the scope of both the Hobbs Act, 18 U.S.C. §1951, and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.*, thereby federalizing all manner of state law claims which heretofore governed resolution of disputes arising from a vast array of political

7. Those defendants who had participated in only one sit-in, and those who had only blocked an entrance were found liable under RICO for conspiracy pursuant to 18 U.S.C. §1962(d).

demonstrations.[8] The Third Circuit's decision has been widely recognized as having an enormous potential for chilling exercise of important First Amendment freedoms[9] and cannot be reconciled with this Court's decision in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1981), as it permits the imposition of civil RICO liability upon those engaging in political dissent irrespective of the extent to which they have attempted to achieve their political objectives through exercise of their First Amendment freedoms of free speech, assembly, petition and association, and regardless of whether the damages assessed for their sporadic "unlawful" activity were directly and proximately caused by their unlawful acts.

The instant case, rather than being an isolated instance of bludgeoning protestors with a statute designed to aid in the prosecution of organized crime's infiltration of legitimate businesses, (or under this Court's decision in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), to obtain damages for commercial fraud or securities violations), has already paved the way for use of RICO against protestors in Brookline, Massachusetts, Philadelphia, Pittsburgh, Chicago and other cities throughout the nation.[10] Further, the dangers inherent in

8. See A. Melley, *The Stretching of Civil RICO: Pro-Life Demonstrators are Racketeers?*, 56 UMKC L. Rev. 287, 309-312 (1988).

9. *See, e.g., Protesters Fear More Racketeering Lawsuits*, The Pittsburgh Press, May 7, 1989, at 24, col. 1 (noting that some prolife organizations have been included as defendants in RICO suits for simply having engaged in pure speech activities such as using their hotline to provide information regarding the occurrence of demonstrations); N. Hentoff, *The RICO Dragnet*, The Washington Post, May 13, 1989, at A-19, col. 1; *Won't Somebody Stop This Runaway RICO Law*?, Newsday, March 12, 1989, at 14, col. 1; *Mario Cuomo, Racketeer*? The Wall Street Journal, March 9, 1989, at A16, col. 1; *Cf.* A. Califa, Legislative Counsel, American Civil Liberties Union, *ACLU: RICO Chilling Effect 'Enormous'*, Nat'l Law J., June 5, 1989, at 72, col. 2.

10. *See, e.g., Town of Brookline, Massachusetts v. Operation Rescue, Inc.*, No. 89-0805-T (D. Mass. filed April 13, 1989) (suit by municipality under, *inter alia*, RICO, 18 U.S.C. 1962, and the Hobbs Act, 18 U.S.C. 1951, against prolife protesters to recover the costs incurred by the municipality to arrest protesters who participated in sit-ins at Brookline abortion clinics); *Allegheny Women's Center v. Operation Rescue*, No. 89-0792 (W.D. Pa. Filed April 10, 1989)(alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without any entry into clinic, constituted Hobbs Act extortion); *Roe v. Operation Rescue*, No. 88-5157 (E.D. Pa. filed June 29, 1988); *National Organization for Women v. Scheidler*, No. 86 C 7888 (N.D., Ill., filed February 2, 1986) (alleging violation of RICO as a result of defendants' alleged conpiracy to steal the bodies of aborted babies from garbage disposals in the Chicago area and transport them across state lines for burial); *North Highland Building Corp. v. Operation Rescue*, No. 88- 2121 (W.D. Pa. filed September 30, 1988)(suit by owner of building which leases space to abortion clinic alleging RICO violation based upon allegation that picketing and sporadic blocking of doors, without any entry into clinic, constituted Hobbs Act extortion).

the Third Circuit's disregard of the limitations on damage awards set forth in *Claiborne* extend far beyond application of RICO. Once the First Amendment protections carefully crafted by this Court in *Claiborne* are disregarded by the lower federal courts, any federal statute, such as the Sherman Act, or garden variety state law claims for trespass[11] or nuisance may be used to squelch dissent on a broad range of public issues by allowing recovery of damages from demonstrators in amounts far in excess of those directly attributable to their unlawful conduct.

Implicit in the Third Circuit's holding is the understanding that the doors to the Federal courthouse are now open for redress of all manner of grievances held by those whose policies or business practices demonstrators seek to change. Given the fact that a Federal cause of action under RICO holds out the possibility of recovery of treble damages, attorneys fees and costs not available in state court and the fact that there have been approximately 30,000 arrests of prolife demonstrators in 380 protests during the last year[12] alone, the Federal courts are likely to see a rapid, astronomical increase in the number of civil damage actions under RICO, none of which would have

11. This is illustrated by the lower courts in this case having permitted imposition of trespass damages in excess of $42,000, not for any damage caused by petitioners at the site of their sit-ins, but for items such as the hiring of guards and installation of a security system in a new location purchased by affiliates of the plaintiff clinic after non-renewal of the clinic's lease at the end of its term.

12. *Connecticut Abortion Protesters Clog Jails*, New York Times, June 21, 1989 at B-1, col. 1.

been possible absent the Third Circuit's novel interpretations of RICO and the Hobbs Act.[13] This result, rather than being dictated by the language of the statute and a reading of Congressional intent in enacting RICO and the Hobbs Act, is contrary to plain language of the statutes and their legislative history.

Heretofore, RICO has been utilized, in both its criminal and civil applications, to root out and disable schemes by which groups, either legitimate or illegitimate in nature, have sought to gain some economic control or advantage over another by unlawful means. The Third Circuit's decision to permit imposition of civil RICO liability upon protesters whose activities were devoid of any profit-making element or potential ignores Congress' plainly stated intent that RICO apply to crime which is adapted to commercial exploitation,[14] thereby extending RICO's grasp beyond protection of economic affairs into the nation's political arena.

Further, the only decisions which have addressed this issue have held that RICO liability cannot be imposed where neither the enterprise, nor the pattern of racketeering activity contain any profit-making elements. *United States v. Flynn,* 852 F.2d 1045, 1052 (8th Cir. 1988) *cert. denied,* 109 S.Ct. 511 (1988); *United States v. Ferguson,* 758 F.2d 843 (2d Cir. 1985) *cert. denied,* 474 U.S. 102 (1985); *United States v. Bagaric,* 706 F.2d 42 (2d Cir. 1983) *cert. denied,* 464 U.S. 840 (1983); *United States v. Ivic,* 700 F.2d 51 (2d Cir. 1983). Thus, this decision creates a sharp conflict with the Second and Eighth Circuits which previously provided uniform guidance on the matter and

13. Standard RICO complaints are circulated by groups such as the National Abortion Federation, a trade organization for the abortion industry. *Going To Court Against Anti-Abortion Action: A Model Pleading Book,* Nat'l Abortion Fed. (1987). *See also Preserving the Right to Choose: How To Deal With Disruption at an Abortion Clinic,* Chapter 6, ACLU (1987) (providing instruction on the filing of RICO suits against prolife protesters).

14. *See, e.g.*, 116 Cong. Rec. 18940 (1970); 116 Cong. Rec. 18941 (1970). *See also The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties*? 46 Notre Dame Law. 55, 161-62 (1970).

produces a result which is not in keeping with Congress' intent as evidenced by RICO's legislative history.

Finally, the decision below rests upon an unprecedented interpretation of the Hobbs Act, 18 U.S.C. §1951 in which, contrary to the plain language of the statute, a defendant is guilty of attempted extortion even where he has appropriated no tangible or intangible property to himself or to a related third party. Under the Third Circuit's interpretation of the Hobbs Act, any group of persons attempting to influence the policies or business practices of a corporation, government agency or other organization or group of persons by means which include a sit-in (traditionally the most common form of civil disobedience) are (and were in this case) deemed to have engaged in Hobbs Act extortion.

Had the very same conduct as was engaged in by petitioners been undertaken to create general mayhem rather than to persuade moderation or cessation of a particular policy or business activity, the courts below would have such conduct remedied by a claim for violation of state laws prohibiting trespass or nuisance, rather than by imposition of civil RICO liability based upon a Hobbs Act extortion. Thus, it is the *nexus* between petitioners' exercise of their First Amendment rights of free speech, petition, assembly and association and their sporadic unlawful acts, rather than the unlawful conduct itself, that converts an action for civil damages for trespass into a Hobbs Act extortion.

Under the Third Circuit's interpretations of RICO and the Hobbs Act, Martin Luther King was a racketeer when he trespassed upon private property and conspired with others in an attempt to change the business policies of owners of segregated lunch counters. So too is anyone participating in a sit-in against apartheid with the goal of changing the investment policies of a university. Indeed, once the lynchpin of economic purpose is removed from RICO and the Hobbs Act, RICO applies to all social protests. The American Civil Liberties Union feared just such a use of RICO when the statute was first proposed, and its fears regarding how the statute might be used in cases of civil disobedience have come to fruition in the Third

Circuit's unwarranted and dangerous interpretation of the scope of RICO.[15]

I. The decision below cannot be reconciled with this Court's decision in *NAACP v. Claiborne Hardware Co.* in that it imposed upon demonstrators engaged in a prolonged struggle to bring about political and social change by exercise of First Amendment rights of free speech, assembly, petition, and association, damages far in excess of those directly and proximately caused by the protesters' sporadic unlawful conduct.

For a period of over nine years petitioners and thousands of others protested plaintiff's business of performing first and second trimester abortions by organizing marches and demonstrations, and engaging in picketing and chanting, including on occasion use of a bullhorn. The petitioners also distributed literature to persons walking into the clinic, and approached women to engage in what petitioners refer to as "sidewalk counseling," during which they would offer information regarding fetal development and financial and other assistance in an attempt to persuade women entering the abortion clinic to carry their babies to term. As was evidenced by the testimony of two women who visited the plaintiff abortion clinic to obtain services on the days on which such protests occurred, the information and assistance offered by the protesters sometimes resulted in women foregoing abortions.[16] Demonstrations outside the clinic occurred with regularity for many years, generally being held on Wednesday, Friday and Saturday of each week. While many of the demonstrations included anywhere from a handful to several hundred protesters, opposition to the plaintiff abortion clinic relocating to a new location in Northeast Philadelphia brought approximately 4,000 protesters to the clinic on June 21, 1985.

This Court has "'recognized that expression on public issues has always rested on the highest rung of the hierarchy of First Amendment values'". *Claiborne,* 458 U.S. at 913 (quoting *Carey v. Brown,* 447 U.S. 455, 467 (1980)).[17] The debate raging across this nation concerning abortion on demand is just such a "public issue" as this Court recognized in its recent ruling on an anti-picketing ordinance designed to prohibit residential picketing of abortionists' homes by prolife protesters when it observed that the ordinance operated "at the core of the First Amendment by prohibiting [protesters] from engaging in picketing on an issue of public concern." *Frisby v. Schultz,* 108 S.Ct. 2503 (1988).[18] In holding that evidence of participation by petitioners in one or more of four sit-ins was sufficient to prove a conspiracy to commit Hobbs Act extortion, the Third Circuit ignored this Court's warning that "[a] massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of a relatively few violent acts." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 933 (1981).[19] Further, despite the

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15. That the RICO claim in the instant case was filed with the intent of suppressing dissent was clearly stated by Edmond Tiryak, Esq., in a convention speech in which he stated that he chose RICO to use against the right-to-lifers because it was so oppressive and impossible to defend. He claimed success at pointing out to "fringe types of people" the perils of following the leadership. Address of E. Tiryak, counsel to Northeast Women Center, Inc., N.O.W. convention (7/14/89) filed as Exhibit "C" to affidavit of Joseph Scheidler in support of defendants' motion for entry of Permanent Protection Order, *N.O.W. v. Scheidler,* No. 86C-7888 (N.D. Ill. filed 1986) at 1-8. The entire transcript of Mr. Tiryak's speech as filed in *N.O.W. v. Scheidler* is attached as Petitions Appendix B.

16. *See* Testimony of Linda Dombrowski and Ninfa Montalvo.

17. *See also Garrison v. Louisiana,* 379 U.S. 64, 74-75 (1964) (stating that "speech concerning public affairs is more than self-expression; it is the essence of self-government") and *New York Times v. Sullivan,* 376 U.S. 254, 269-70 (1964).

18. *See also Bowen v. Kendrick,* 108 S.Ct. 2562 (1988), *Roe v. Abortion Abolition Society,* 811 F.2d 931 (5th Cir. 1987), *cert. denied,* 108 S. Ct. 145 (1987).

19. In *Claiborne,* a local chapter of the NAACP organized a boycott of white merchants and enforced the boycott by several means, including a number of acts of violence directed primarily against blacks not honoring the boycott, such as the firing of gunshots into their homes (on at least three occasions), slashing of tires, throwing a brick through a windshield of a car,

overwhelming evidence that the prolife protests engaged in by petitioners for over nine years prior to the plaintiff instituting suit in this case had been dominated by the exercise of First Amendment freedoms of speech, petition, assembly, and petition, the Third Circuit held that a minor amount of property damage occuring at one of the sit-ins in which 12 of the 27 petitioners herein participated was a cognizable RICO injury, resulting in a recovery of treble damages, costs, and an attorneys' fee award equal to 73 times the amount of property damage alleged found to have been caused by petitioners. The petitioners were also labeled "racketeers" which has been recognized by this Court as carrying with it an inevitable stigma.[20] In addition, over $42,000 in damages attributable primarily to the plaintiff's purchase of a security system and the hiring of guards at its new business location was awarded despite the fact that the four sit-ins which formed the basis for a finding of Hobbs Act extortion occurred at a separate location. Even if the sit-ins had occurred at the same location at which the expenditures were made, they cannot be characterized as the direct and proximate result of the sit-ins as required by *Claiborne*, otherwise every increased cost of a business which prompts protests from some citizens could be recovered from the protesters, and the carefully crafted principles designed by this Court to prevent a chilling of First Amendment freedoms would be rendered meaningless.[21]

NOTES *(Continued)*

stealing whiskey purchased from a white merchant, placing threatening phone calls. *Claiborne*, 458 U.S. at _____ - _____.

20. *Sedima v. S.P.R.L. Imrex Company, Inc.*, 741 F.2d 482 (2d Cir. 1984) *rev'd on other grounds,* _____ U.S. _____ (1985).The stigma associated with a charge of "racketeering," whether in the context of a criminal or civil proceeding, is great and may in itself deter participation in protected First Amendment activities for fear of being labeled a racketeer. *See United States v. Guilano*, 644 F.2d 85, 89 (2d Cir. 1981) (charge of racketeering itself may prejudice the jury).

21. The danger of this aspect of the decision below cannot be overemphasized, and is very real, as evidenced by the RICO suit filed recently against prolife organizations and inviduals by the Town of Brookline, Massachusetts in which it seeks to recover the costs associated with

That the constitutional protections set forth in *Claiborne* apply in the case at bar is apparent upon an examination of the facts of this case: (1) it is beyond dispute that the petitioners were participating in a prolonged struggle to bring about social and political change, and that much of their activity in protesting abortion on demand consisted of demonstrations, picketing, leafletting, sidewalk counseling and the like which the district court conceded was protected First Amendment activity; (2) the "violent acts" identified with the petitioners' participation in the political protests could hardly be characterized as pervasive in the context of nine years of protests at the plaintiff clinic, and they did not remotely approach the level of violence which occurred in *Claiborne;* and (3) the damages awarded did not flow directly and proximately from the petitioners' actions. The Third Circuit's decision cannot be reconciled with this Court's holding that, despite boycott leaders' intent in that case to harm the merchants economically, leaders of and participants in a boycott of white merchants could not be held jointly and severally liable for the merchants' lost earnings based on evidence that fear of reprisal had caused some black citizens to withhold their patronage:

> No federal rule of law restricts a State from imposing tort liability for business losses that are caused by violence and by threats of violence. When such conduct occurred in the context of constitutionallly protected activity, however, 'precision of regulation' is demanded. *NAACP v. Button,* 371 U.S. 415, 438 (1963). Specifically, the presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability and on the persons who may be held accountable for those damages.

Claiborne, 458 U.S. at 916 (footnote omitted). "Precision of

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arresting participants in a peaceful sit-in. The enormous chilling effect of such actions, especially in light of the Third Circuit's decision in this case, is obvious. Such an action by a governmental subdivision also poses the very grave danger that damage suits will be selectively pursued against only those with whom the leadership of the governmental subdivision disagree.

regulation," this Court said, demanded that damages be awarded only to the extent that losses were directly and proximately caused by any unlawful conduct. *Id*. at 918, 921.

The constitutional principles established by this Court in *Claiborne* also placed severe restraints upon the imposition of damages on a conspiracy theory, holding that for liability to be imposed **it is necessary to establish that the group itself and each individual upon whom damages are to be imposed held a specific intent to further illegal aims or to commit the violent act which resulted in the damage.** *Id.* at 919-20. In this case, the RICO injury found by the jury was based solely upon testimony to the effect that the suction aspirator devices had been checked on the morning of August 10, 1985 by employees of the clinic and were in working order, and that they were dismantled when the sit-in in was over. There was no testimony that any particular person, let alone any of the petitioners had dismantled the equipment, and the jury did not make any finding as to who damaged the equipment. As no perpetrator was named, and as only 12 of the petitioners participated in the sit-in which is alleged to have caused the RICO injury, RICO liability cannot, under *Claiborne,* be imposed upon the petitioners because this Court has held that the standards for imposing such liability on what is essentially a conspiracy theory

> must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding imposition of punishment for constitutionally protected activity. The burden of demonstrating that fear rather than protected conduct was the dominant force in the movement is heavy.

Claiborne, 458 U.S. at 933-34. That burden has not been met in this case.

The plaintiff had available to it civil remedies under State law which would have compensated it for those direct injuries. Petitioners do not argue that plaintiff is not entitled to recover damages for nuisance, civil trespass, or destruction of property

to the extent the same are proven and flow directly from any activities engaged in by the petitioners which are not protected by the First Amendment. The result reached by the Third Circuit, however, clearly does not provide the "precision of regulation" demanded by the First Amendment. *Claiborne,* 458 U.S. at 921.

II. The decision below creates a conflict with the Second and Eighth Circuit decisions holding that RICO liability may not be imposed where neither the enterprise nor the pattern of racketeering activity had any profit-making element, and is directly contrary to the legislative history of RICO

Although the dearth of case law on this issue is testimony to how infrequently RICO liability has been sought for non-economically motivated activities, this issue has arisen before. In *United States v. Ivic,* 700 F. 2d 51 (2d Cir. 1983), the Second Circuit held that a RICO conviction could not be sustained upon evidence that the defendants engaged in the underlying predicate acts merely to advance their political beliefs, but without seeking any economic control or advantage from their acts. The defendants in *Ivic* were four Croatian nationalists advocating separation of Croatia from Yugoslavia, who were prosecuted under RICO, 18 U.S.C.1962(d), for conspiracy to violate the provisions of Section 1962(c) of the RICO statute. The predicate acts underlying the RICO prosecution included the attempted murder of a perceived political opponent, as well as conspiracies to bomb a travel agency that specialized in travel to Yugoslavia. The indictment charged that defendants "conspired to engage in various criminal activities including acts and threats involving murder and arson as chargeable under the laws of the State of New York". *Ivic* at 58. The indictment charged further, and the evidence demonstrated, that " '[i]t was the primary object of this criminal enterprise' that the defendants 'would and did use terror, assassination, bombings, and violence in order to foster and promote their beliefs and in order to eradicate and injure persons whom they perceived as in opposition to their beliefs.' " *Id.*

The Second Circuit held that the RICO conviction could not be sustained on grounds that "the conduct charged in the indictment and proved at trial did not consitute an offense under §1962(d) [of the RICO statute] because, as the Government conceded at argument, it was neither claimed nor shown to have any mercenary motive." Id. at 59 & n.5.[22]

In reaching its decision, the *Ivic* court conducted an exhaustive analysis of both the language and the legislative history of the RICO statute, and found that, applying the Section 1961 definition of "enterprise" to Section 1962(c) as read in conjunction with Section 1962(a) and (b), the word "enterprise" clearly contemplated "an organized profit-seeking venture." *Id.* at 60. Because defendants' venture was devoid of any such profit-making activities, and was, rather, designed to promote their political ends, the court concluded that it could not be an "enterprise" within the meaning of the RICO statute. The court found that the statement of purpose prefacing the statute, as well as the very meaning of the word "racketeering," provided further evidence of the statute's economic thrust.[23] The *Ivic*

22. Indeed, the Court found that for this reason, the indictment itself had failed to charge an offense under the statute, and that consequently the convictions constituted "plain error" permitting the court to rule on the issue even though neither party had raised it either at trial or on appeal. *Id.* at 59 n.5.

It was neither alleged nor argued that petitioners had engaged in abortion protests in order to obtain money or to achieve any other mercenary goal. Indeed, plaintiff maintained throughout the trial that petitioners' protest arose solely out of their opposition to abortion.

23. The court also noted that its interpretation of the statute was in line with the Justice Department's own guidelines on RICO prosecutions, which it cited as illustrative of the Department's own understanding of the statute. Those guidelines provided that:

> [N]o RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association in fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an *economic* goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity.

Ivic at 64. (emphasis supplied by the court) (citing Memorandum of

court's holding was further supported by its analysis of RICO's legislative history, from which the court concluded that Congress designed RICO to thwart organizations that obtain economic gain or advantage through unlawful means:

> Other statements by the sponsors of RICO indicate its inapplicability to crimes having no economic motivation. Senator McClellan, the principal sponsor of the Organized Crime Control Act of 1970, made clear on several occasions that the purpose of Title IX is "economic" and that the only crimes included in [Section] 1961(1) are those adapted to "commercial exploitation." [Citations omitted.] Responding to objections of the Association of the Bar of the City of New York and the ACLU that the list of predicate racketeering acts in [Section] 1961(1) included offenses often committed by persons not involved in organized crime, Senator McClellan stated: "It is self-defeating to attempt to exclude from any list of offenses such as that found in title IX all offenses which commonly are committed by persons not involved in organized crime. Title IX's list does all that can be expected . . . . The danger that commmission of such offenses by other individuals would submit them to proceedings under Title IX is even smaller than any such danger under Title III of the 1968 [Safe Streets] Act, since commission of a crime listed under Title IX provides only one element of Title IX's prohibitions. Unless an individual not only commits such a crime but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, he is not made subject to proceedings under Title IX.

Id. at 63-64. (emphasis supplied by the court.) [emphasis must be inserted] Thus, while it is clear from RICO's legislative history that its drafters' intent was to recognize and leave open the possibility that the statute, which was directed primarily

Philip Heymann, Assistant Attorney General, Criminal Division (January 16, 1981)).

against organized crime could be used against legitimate businesses and groups (an understanding that this Court confirmed in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985)), it is also clear that the drafters of the statute considered the use of a pattern of Section 1961 crimes to gain an economic advantage the *sine qua non* of a RICO violation, without which one could not be subject to liability under any section of the statute.[24]

In *United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988) the Eighth Circuit stated that "for purposes of RICO, an enterprise must be directed toward an economic goal," and

24. That either the enterprise or an alleged pattern of racketeering activities be used primarily to gain an economic advantage was reiterated by the Second Circuit in *United States v. Bagaric*, 706 F.2d 24 (2d Cir. 1983) and *United States v. Ferguson*, 758 F.2d 843 (2d Cir. 1985). *Bagaric* and *Ferguson*, were two cases related to *Ivic*, in which the Second Circuit upheld the RICO convictions of defendants, also Croation nationalists, for engaging in terrorist activities to further their political beliefs. But these cases were critically different from *Ivic* and from the instant case in that the defendants were alleged and proven to have used their predicate acts, involving murder, attempted murder and robbery, to obtain money to support their political and terrorist operation:

> In *Ivic*, we expressly stated that we were not addressing a situation in which a terrorist organization engaged in robberies to obtain money to further their activities. 700 F.2d at 61 n.6. **Here, the defendants' activities centered around the commission of economic crimes.** These defendants were charged with ten robberies and attempted robberies of armored trucks, the murders of guards and police officers at the scene of those crimes **and the use of the money obtained from those robberies to support enterprise members** and to maintain safe houses.

Ferguson, 758 F.2d at 853 (emphasis added). The activities of petitioners in this case stand in stark contrast to those engaged in by the defendants in *Ferguson* as none of the activities in which they engaged could have, nor did they, place one thin dime in the pockets of the petitioners. In *Bagaric*, in which defendants were shown to have carried out a scheme to extort money from the victims of their crimes to support their activities and to murder those extortion targets who refused to pay. Thus, as was the case in *Ferguson*, the defendants in Bagaric were shown to have used the activities defined in Section 1961 of the RICO statute to obtain money from the very victims of those crimes — i.e. the targets of their extortion.

found a sufficient economic purpose in the enterprise's objective of controlling St. Louis labor unions. The Third Circuit's opinion is devoid of any discussion or analysis of the legislative history of the statute and makes no attempt to distinguish the instant case from decisions of the Second and and Eighth Circuits.

The Third Circuit's statement that "[petitioners] argue that because their actions were motivated by their political beliefs, civil RICO is inapplicable," (Pet. App. _____), is incorrect. Rather than claiming any special exemption from application of RICO on the basis of the motivations behind their protest activities, petitioners argument is that those of petitioners' activities which are alleged to justify imposition of civil RICO liability did not in fact and could not have resulted in them appropriating to themselves or any third party any economic benefit or advantage. *United States v. Dickens*, 695 F.2d 765, 772 (3d Cir. 1982), *cert. denied*, 460 U.S. 1092 (1983), the only case relied upon by the Third Circuit in its decision to extend RICO to acts of civil disobedience is inapposite, as it involved a RICO prosecution of a group of defendants who committed a series of robberies in order to finance a religious organization. Thus, rather than supporting the Third Circuit's decision, *Dickens* simply provides one more example of a case in which the defendants' racketeering activity was used to finance their enterprise and is consistent with the Second and Eighth Circuit decisions.

This Court's decision in *Sedima* does nothing to weaken the Second and Eighth Circuit's interpretation of the statute or its assessment of the legislative history of RICO. In fact, it continues the tradition of applying RICO to crimes having an economic dimension, and because the activity charged was classically economic in nature, the issue that was before the court in Ivic did not even arise.[25] Further, in *dicta*, this Court gave support to the Second Circuit's view that commission of

25. This Court in *Sedima* dealt only with the nature of the injury suffered by the plaintiff, and did not touch on the nature of the acts by defendant required to impose liability under the statute.

the requisite number of predicate acts is not all that RICO requires: "[i]f the defendant engages in a pattern of racketeering activity **in a manner forbidden by these provisions,** and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under Section 1964(c)." *Id.* at 495 (emphasis added).

The Third Circuit's decision is contrary to the clear requirement established in both RICO's legislative history and in the Second and Eighth Circuit decisions holding either the enterprise or the racketeering activity have an economic or profit-making purpose and should be reversed by this Court.

III. The decison below to permit a RICO violation based upon predicate acts to others creates a sharp split in the Circuits and conflicts with *Sedima* as to both standing and "pattern of racketeering activity"

Plaintiff abortion clinic lacked standing to allege the extortion of its employees as a predicate offense where it suffered no proximate damage from such activity. Plaintiff also failed to establish a "pattern of racketeering activity" as the only compensable injury to plaintiff was caused by a single predicate offense.

The jury found that petitioners had committed two predicate offenses: (a) a conspiracy to extort the clinic's intangible right to continue its abortion business free from wrongfully imposed outside pressure; and (b) a conspiracy to extort from the clinic's employees their property interest in continuing employment at the clinic. The jury also found that the only harm caused by these predicate acts was the $887.00 damage to suction aspirator devices which the plaintiff alleged had occurred during the August 10, 1985 sit-in.

The Third Circuit's opinion reinforces its previous decision in *Town of Kearny v. Hudson Meadows Urban Renewal,* 829 F.2d 1263, 1268 (3d Cir. 1987) which holds that acts injurious to others can be considered predicate acts. In accord, *see Marshall & Ilsley Trust Co. v. Pate,* 819 F.2d 806, 809 (7th Cir. 1987). This clearly conflicts with *Yellow Bus Lines, Inc. v.*

Union Local 639, 839 F.2d 782, 790 (D.C.Cir. 1988), *cert. denied* 109 S. Ct. 309 (1988), which held that only the pattern of labor violence directed against plaintiff Yellow Bus Lines, and not others, could be considered in the "pattern of racketeering activity." The lower courts are also split on this issue. *Bender v. Continental Towers, Ltd. Partnership,* 632 F. Supp. 497, 502 (S.D.N.Y. 1986) (injuries to others cannot be considered to establish pattern of racketeering activity); *Pandick, Inc. v. Rooney,* 632 F. Supp. 1430, 1433 (N.D.Ill. 1986) (injuries to others may not be considered in determining pattern). Under this Court's holding in *Sedima,* the plaintiff has standing only if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. *Sedima,* 473 U.S. at 495. The jury found that the only RICO injury suffered by plaintiff was $887 in property damage during one sit-in and found that neither the employees nor the clinic had sustained any cognizable injury as a result of the extortion of its employees. A defendant who engages in racketeering activity is not liable to those who have not been injured. *Haroco, Inc. v. American National Bank & Trust Co. of Chicago,* 747 F.2d 384 (7th Cir. 1984) *aff'd* 473 U.S. 606 (1985). Obviously, as petitioners caused no injury to the employees of the clinic by the "extortion" of their right to continued employment, they also caused no injury to the plaintiff. This Court has acknowledged that while two acts of racketeering activity are necessary for a RICO violation, they may not be sufficient. *Sedima,* 473 U.S. at 497 n. 14. Plaintiff failed to establish the requisite RICO "pattern of racketeering activity" because neither the clinic nor the employees suffered harm as a result of one of the two predicate acts upon which the jury based its verdict.

IV. The decision below is an unwarranted and unprecedented expansion of the scope of the Hobbs Act, 18 U.S.C. §1951, is contrary to the plain language of the statute, undercuts the legislative history of the statute, and federalizes as Hobbs Act extortions all forms of political protest which involve sit-ins or trespass.

The courts below have engaged in a novel and unwarranted expansion of the scope of the Hobbs Act, by holding that it applies to activities which by the plain meaning of the statute are not indictable as Hobbs Act extortion. The Hobbs Act defines "extortion" as **"the obtaining of property from another,** with his consent, induced by wrongful use of actual or threatened force, violence, fear or under color of official right." 18 U.S.C. §1951(b)(2) (emphasis added). Black's Law Dictionary (5th Ed. 1979) defines "obtain" as follows: "[t]o get hold of by effort; to get possession of; to procure; to acquire, in any way". Thus, the plain meaning of the statute could not be more obvious – the "obtain property" element of a Hobbs Act extortion is met if the defendant (or a related third party at defendant's direction), acquires, or attempts to acquire property as a result of threatened force, violence or fear.

The Hobb's Act definition of extortion is derived from the criminal code of New York. *United States v. Furey,* 491 F.Supp. 1048 (E.D.Pa.), *aff'd*, 636 F.2d 1211 (3d Cir.1980), *cert. denied*, 451 U.S. 913 (1981). That the petitioners neither appropriated to themselves nor for any related third party the plaintiff's intangible interest in continuing to provide abortion services was apparent upon completion of the plaintiff's case, and should have resulted in a directed verdict for defendants on plaintiff's Hobbs Act extortion.[26] The district court's instructions to the jury on extortion[27] effectively wrote out of the

26. *See* petitioners' argument on this point in Pet. App.

27. The jury was instructed that "a person is guilty of extortion if he induces his victim to **part with property** through the use of fear . . . and that "[i]f you find any of the defendant [sic] entering the [plaintiff's] property without authorization or by otherwise wrongfully preventing the [plaintiff] from operating, induced or attempted to induce either the [plaintiff], its employees or its patients to part with property as a result of fear, you may find that those defendants are liable for extortion." (emphasis added)

Hobbs Act any requirement that a defendant obtain, attempt to obtain, or conspire to obtain property, substituting therefor a requirement that plaintiff "surrender" or "be deprived of" property. The courts below thus ignored the fundamental principle of statutory construction that criminal statutes must be strictly construed and that even when ambiguities exist within a statute (which is not the case with respect to Section 1951(b)(2) of the Hobbs Act), any "ambiguity concerning the ambit of criminal statutes should be resolved in factor of lenity." *Rewis v. United States,* 401 U.S. 808, 812 (1971) (citation omitted).[28] The Third Circuit's assertion that petitioners proferred no point for charge on the necessity of proving that petitioners acquire property is simply incorrect. Counsel for defendants objected to the district court's instruction on extortion specifically on that basis[29] and petitioners submitted points for charge on extortion taken from New York Standard Jury Instructions.

The Third Circuit's decision directly contradicts the plain wording of the Hobbs Act and is not supported by the decisions

28. By deleting the requirement that the petitioners "obtain property" from the plaintiff by virtue of the extortion of intangible rights, the Third Circuit conflicts with this Court's pronouncements on similar statutes. *McNally v. U.S.,* 107 S.Ct. 2873 (1987) (citizens cannot be defrauded of intangible rights pursuant to 18 U.S.C. §1341); *Dowling v. U.S.*, 473 U.S. 207 (1985) (interstate transportation of stolen property, 18 U.S.C. 2314, does not apply to transportation of copyrighted material). The origin of the Hobbs Act as well as 18 U.S.C. §§1341, 2314 is common law theft necessitating the obtaining of tangible property by the perpetrator of the extortion.

29. Counsel for petitioners interposed the following objection: "Mr. Stanton: Your Honor, I have a comment on the extortion [instruction]. I am looking at the jury instruction from New York, New York Standard Criminal Jury Instruction on extortion and it does say that the property can't be just surrendered. The property has to be appropriated by the alleged extortee [sic] third person. The impression is left from this instruction that if somebody surrendered something, including an intangible property right, that's all that's necessary. There has to be a showing something was appropriated, by the person committing the extortion or then transferred to a third-party and that the problem I have with this instruction. It leaves the instruction if somebody surrendered something that [sic] all that's necessary."

cited in its opinion.[29] *U.S. v. Cerelli,* 603 F.2d 415 (3d Cir. 1979), involved threats to obtain monetary contributions to a political party, and in *U.S. v. Starks,* 515 F.2d 112 (3d Cir. 1975), money was extorted under the apparent guise of a religious organization. In *United States v. Anderson,* 716 F.2d 446 (7th Cir. 1983), there was evidence produced at trial that defendants had extorted $300 from their victim and had talked of nothing during the first two days in which they held him captive other than how to obtain more money. Thus, in each of the cases cited by the Third Circuit in support of its holding that property need not be obtained by the defendant, the defendant had attempted to obtain or obtained money, either for himself or for a third party to whom defendant directed that the payment be made. The cases relied on by the Third Circuit might, therefore, be more aptly cited in support of the petitioners' contention that the statute means what it says, and that Hobbs Act extortion has not heretofore been found where the defendant appropriated no property to either himself or any related third party.[30]

Rather, the Third Circuit has substituted the term "deprive another of property" or "cause another to surrender property" for the statutory language of "obtain property" in construing the Hobbs Act.

Should Congress wish to have the Hobbs Act apply to situations in which the defendant obtains no property, either tangible or intangible, and where it can only be shown that, because of a political protest, plaintiff "surrendered" or "was deprived of" its intangible right to do business free of interference by protesters, Congress can amend the statute. The serious First Amendment considerations of such a legislative

30. Neither do the cases cited by plaintiff support the Third Circuit's interpretation of the Hobbs Act. In *U.S. v. Green,* 350 U.S. 415 (1955), the defendant was a union representative who used threats to **obtain** jobs for union employees. While the extortionist himself was not benefitted, the employees receiving the jobs were. In *U.S. v. Local 560,* 780 F. 2d 267 (3d Cir. 1985), the defendants intimidated union members into giving up their statutory right to participate in union affairs, clearly benefitting the defendants by enabling them to acquire control of *Local 560.*

proposal aside, it is for Congress, not the Third Circuit Court of Appeals, to amend the criminal statute in question, and this Court should reject such an unprecedented and dangerous expansion of the statute.

V. The decision below concerning the application of Federal Rule Civil Procedure No. 51 creates a sharp split in the circuits concerning what is required to preserve error for appeal.

Before closing argument, petitioners submitted a written point for charge on trespass which contained instructions outlining the measure of damage for trespass. (Pet. App. 161-162). The district court declined to rule on this point and declined to instruct as requested. The jury ultimately awarded 42,087.95 in trespass damages.

Petitioners contended in their post-trial motions, and on appeal in the court below, that the district court charge on trespass was incomplete and misleading in that the charge did not include guidance on the correct measure of damages for trespass. Plaintiff responded to these arguments in the district court without interposing a claim of waiver. The district court ultimately rejected petitioners claim that its charge was defective (Pet. App. 67-68). Plaintiff, in the Third Circuit, again contested petitioner's challenge to the district courts charge but, for the first time, asserted that petitioners challenge was waived. The court below accepted plaintiff's untimely claim of waiver. (Pet. App. 9)[31] This holding was wrong for several reasons.

Although the district court rejected petitioners' challenge to its charge on trespass damage, the challenge was considered on the merits by the district court, and in responding to the challenge, plaintiff argued on the merits and did not claim waiver. Consequently, the lower court erred in accepting

31. The court below simply ignored petitioners' contention that the trespass damage verdict lacked a sufficient evidentiary basis. This was error as appellate review of all grounds supporting a judgment is available at the instance of the losing party. . . . *In re Trimble Co.,* 479 F.2d 103, 111 (3rd Cir. 1973).

plaintiff's untimely claim of waiver as it is plaintiff who must forego its claim of waiver by not asserting it. *See City of Newport et al. v. Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981).

Under Federal Rule of Procedure No. 51, any party may file a written request that the court instruct the jury on the law as set forth in the request. Once this is done, as it was in this case, the Rule provides that the court "shall" inform counsel of its proposed action on the written request prior to counsel's arguments to the jury. Here the court failed to inform counsel of its proposed action on their written request concerning trespass under state law. The appropriate cure for the trial court's failure to comply with Rule 51 is to relieve the party aggrieved thereby of the operation of the prohibition against asserting as error the giving of or failure to give an instruction to which objection has not been made. *Swain v. Boeing Airplane Co.*, 337 F.2d 940, 942-943 (2nd Cir. 1964), *cert. denied.* 380 U.S. 951 (1965); *Swift v. Southern Railroad,* 307 F.2d 315, 320-321 (4th Cir. 1962); and *Hetzel v. Jewel Co., Inc.*, 457 F.2d 527, 536 (7th Cir. 1972).

The Third Circuit Court also erred in accepting plaintiff's claim of waiver as the district court declined to give petitioners' written point for charge on trespass[32], and as petitioners' counsel published their contentions concerning the measure of damage in their closing summations. Notwithstanding this, the district court declined to instruct as requested and advised, and under these circumstances, the petitioner's challenge to the charge on trespass was properly preserved. *See Bolley v. Stotler,* 751 F.2d 631 (3rd Cir. 1985); *Irvin Jacobs & Co. v. Fidelity & Deposit Co. of Maryland.* 202 F.2d 794, 800-801 (7th Cir. 1953).

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32. The court below was so advised in main brief of petitioner Guerra et al. at No. 88-1336, p. 40.

CONCLUSION

Petitioners respectfully request that the writ of certiorari be granted.

Respectfully submitted,

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